(1) Supreme Court, U.S.
FILED
OCT 12 2000
OFFICE OF THE CLERK

No. 00 600

In The Supreme Court of the United States

Ryan's Family Steak Houses, Inc.,
Billy Lewis, and Steve "Doe,"
Petitioners,

v.

Sharon Floss,
Respondent.

Ryan's Family Steak Houses, Inc.,
Petitioner,

v.

Kyle Daniels,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

STEPHEN F. FISHER
Counsel of Record
JACKSON, LEWIS, SCHNITZLER
& KRUPMAN
2100 LANDMARK BUILDING
301 N. MAIN STREET
GREENVILLE, SC 29601-2122
(864) 232-7000

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

70pp

QUESTIONS PRESENTED

In deciding whether an arbitration system is "structurally biased" in violation of the Federal Arbitration Act (FAA), may a District Court presume bias without any evidentiary showing?

Does the federal common law of arbitration imply the covenant of good faith and fair dealing into every arbitration contract which falls under the FAA?

Is the FAA violated when judicially created contract law is applied in such a manner as to invalidate arbitration agreements which are otherwise enforceable?

LIST OF PARTIES TO THE PROCEEDING

Petitioners

The caption of the case in the Floss v. Ryan's Family Steak Houses, Inc., et al. matter includes all parties to the proceeding in the United States District Court for the Eastern District of Kentucky. The caption of the case in the Daniels v. Ryan's Family Steak Houses, Inc. matter includes all parties to the proceeding in the United States District Court for the Eastern District of Tennessee. The United States Court of Appeals for the Sixth Circuit consolidated the two separate cases. Petitioners are Ryan's Family Steak Houses, Inc., Billy Lewis, and Steve "Doe." Pursuant to Rule 29(6) of the Rules of the Supreme Court of the United States, Ryan's Family Steak Houses, Inc., respectfully submits that it is a publicly traded company, which has no parent company and owns no subsidiaries. Billy Lewis and Steve "Doe" are individuals and have no corporate affiliations.

Respondents

Kyle Daniels and Sharon Floss.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

LIST OF PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

CITATION TO REPORTS OF OPINIONS 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 4

A. THE SIXTH CIRCUIT ERRED IN PRESUMING ARBITRAL BIAS, RATHER THAN REQUIRING PROOF OF BIAS, AS THIS COURT AND FOUR OTHER CIRCUITS HAVE DONE 5

B. THE COURT OF APPEALS MISINTERPRETED THE FEDERAL COMMON LAW OF ARBITRATION BY REFUSING TO IMPLY THE COVENANT OF GOOD FAITH INTO A CONTRACT FALLING UNDER THE FAA 12

C. THE SIXTH CIRCUIT VIOLATED § 2 OF THE FAA BY CONSTRUING COMMON LAW CONTRACT PRINCIPLES IN A DISCRIMINATORY MANNER HOSTILE TO ARBITRATION AGREEMENTS 16

CONCLUSION 20

APPENDIX A
Court of Appeals Opinion, May 1, 2000 . . . . . 1a

APPENDIX B
District Court for the Eastern District of Tennessee, Order, February 23, 1999 . . . . . 21a

APPENDIX C
District Court of Eastern District of Kentucky, Order, October 20, 1998 . . . . . 29a

APPENDIX D
Magistrate, District Court for the Eastern District of Kentucky, Report and Recommendation, September 1, 1998 . . . . . 31a

APPENDIX E
Court of Appeals, Order Denying Rehearing, July 14, 2000 . . . . . 41a

TABLE OF AUTHORITIES

Cases:

Allied-Bruce Terminix Companies, Inc. v. Dobson, 115 S.Ct. 834 (1995) 13, 17

Apperson v. Fleet Carrier Corp., 879 F.2d 1344 (6th Cir. 1989) 10

Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465 (D.C. Cir. 1997) 7, 11

Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213 (1986) 7, 12

Doctor's Associates, Inc. v. Casarotto, 116 S.Ct. 1652 (1996) 18

First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995) 17

Floss v. Ryan's Family Steak Houses, Inc., 211 F.3d 306 (6th Cir. 2000) 1, 3, 10, 11

Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) . . . . . *passim*

Hooters of Am., Inc. v. Phillips, 173 F.3d 933 (4th Cir. 1999) 9, 14, 15, 18

Koveleskie v. SBC Capital Markets, Inc., 167 F.3d 361 (7th Cir. 1999) 8, 10, 11

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) 9, 12

Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983) 12, 14

O'Melveny & Myers v. FDIC, 512 U.S. 79 (1994) 13

Permanence Corp. v. Kennametal, Inc., 908 F.2d 98 (6th Cir. 1990) 15, 19

Perry et al. v. Thomas, 482 U.S. 483 (1987) . . . . . *passim*

Ranier v. Mt. Sterling Nat'l Bank, 812 S.W.2d 154 (Ky. 1991) 18

Rosenberg v. Merrill Lynch, 170 F.3d 1 (1st Cir. 1999) 8, 10

Shearson/American Express, Inc., et al. v. McMahon et al., 482 U.S. 220 (1987) 14

Southland Corp. et al. v. Keating et al., 465 U.S. 1 (1984) . . . . . *passim*

Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630 (1981) 13

Trumbull v. Century Marketing Corp., 12 F.Supp.2d 683 (N.D. Ohio 1998) 3

Wallace v. Nat'l Bank of Commerce, 938 S.W.2d 684 (Tenn. 1996) 18

Wright v. Universal Maritime Service Corp. et al., 142 L.Ed.2d 361 (1998) 14

Statutes:

9 U.S.C. § 1 *et seq.* . . . . . *passim*

28 U.S.C. §1254(1) 1

28 U.S.C. §§1331 and 1367 1

29 U.S.C.§201 *et seq.* 1

29 U.S.C.§12101 *et seq.* 1

Other Authorities:

Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d §4514 (1996) 13

Ryan's Family Steak Houses, Inc. ("Ryan's") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in these two consolidated cases.

CITATION TO REPORTS OF OPINIONS BELOW

The consolidated opinion of the United States Court of Appeals for the Sixth Circuit (App. A, *infra,* 1a-20a) is reported at Floss v. Ryan's Family Steak Houses, Inc., 211 F.3d 306 (6th Cir. 2000). The respective opinions of the two district courts (App.B and C, *infra,* 21a-28a and 29a-40a) are unreported.

JURISDICTION

Jurisdiction in the district court in Floss was invoked under the Fair Labor Standards Act, 29 U.S.C.§201 *et. seq.* and 28 U.S.C. §§1331 and 1367. The jurisdiction in the district court in Daniels was invoked under the Americans with Disabilities Act, 29 U.S.C.§12101 *et. seq.* and 28 U.S.C. §§1331 and 1367.

The cases were appealed to the Sixth Circuit under the appeal provisions of the Federal Arbitration Act (9 U.S.C. § 1 *et seq.*). The court of appeals consolidated the two cases and issued its opinion on May 1, 2000. That court denied Ryan's petition for rehearing and rehearing *en banc* on July 14, 2000. (App., *infra*, 41a-42a.)

This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

These cases involve judicial interpretation of the Federal Arbitration Act (FAA), 9 U.S.C. § 1 et. seq.

STATEMENT OF THE CASE

These two cases consider whether a nationwide third-party arbitration system, used exclusively for resolving employment disputes, is enforceable under the FAA.

Ryan's operates a chain of family restaurants. The two Plaintiffs are former employees, with Floss having worked in a Kentucky store and Daniels having worked in a Tennessee store. Before working at Ryan's, each Plaintiff signed a third-party arbitration contract with Employment Dispute Services, Inc. (EDSI). EDSI is an independent company that provides a neutral arbitration forum for resolution of employment-related disputes. [1/] Ryan's is a third-party beneficiary under the employee-EDSI arbitration agreement.

Daniels filed suit in the Eastern District of Tennessee in May 1998, claiming he was discharged in violation of the ADA. Ryan's petitioned the district court pursuant to the FAA to enforce the EDSI-Daniels arbitration contract, requesting an order compelling arbitration and staying the litigation. The district court refused to enforce the arbitration agreement, holding that Daniels did not knowingly and clearly waive his federal statutory rights, including his right to a jury

---

[1/] EDSI had been known as "EDR" prior to 1997.

trial. The district court also found the arbitration contract was unenforceable on mutuality of obligation grounds. [2/]

Floss filed suit in February 1998, alleging both Fair Labor Standards Act (FLSA) and state law claims. Ryan's petitioned the district court pursuant to the FAA to compel Floss to arbitrate her claims and to stay the judicial action. The district court held that Floss's FLSA claim was subject to arbitration and granted Ryan's petition to compel. The court also rejected Floss's fraudulent inducement challenge to the arbitration agreement.

The Sixth Circuit consolidated the two cases on appeal, and issued its opinion on May 1, 2000. The court reversed in Floss and affirmed in Daniels, ultimately denying Ryan's petition to compel arbitration in both cases. (App. A, *infra*, 3a, 19a-20a.) Under the Sixth Circuit's view, neither Plaintiff "validly waived their right to bring an action in federal court." (App. A, *infra*, 3a.) Though there was no supporting evidence before the court, the Sixth Circuit was hostile to the EDSI system in many particulars. The court attacked the neutrality of the forum based on nothing more than the "uncertain relationship" between the employer (Ryan's) and the arbitration services provider (EDSI). (App. A, *infra*, 14a.) The Sixth Circuit also found bias because EDSI allegedly would have been motivated to favor its routine customers--the employers. The Sixth Circuit criticized EDSI's rule that allowed employees to be required to pay one-

---

[2/] The district court's sole authority for its contract law analysis was one district court opinion, Trumbull v. Century Marketing Corp., 12 F.Supp.2d 683 (N.D. Ohio 1998). The court failed to cite any state authority, either legislative or judicial, in this part of its order.

half the arbitration fee. (App. A, *infra*, 15a.) Finally, the penultimate basis of the Sixth Circuit's decision was the unstated presumption that EDSI would act in bad faith based on nothing more than EDSI's ability under the governing rules to amend the arbitration rules from time to time. Based simply on this right to amend, the Sixth Circuit found EDSI's promise to provide an arbitral forum to be illusory. (App. A, *infra*, 18a-19a.)

The Sixth Circuit denied Ryan's Petition for Rehearing and Rehearing *En Banc* on July 14, 2000. (App. E, *infra*, 41a-42a.)

REASONS FOR GRANTING THE WRIT

Certiorari should be granted. The Sixth Circuit's holding is at odds with prior decisions of this Court as well as at least four other circuits with respect to the standard to prove arbitral bias under the FAA. The Sixth Circuit also misinterpreted the federal common law of arbitration by failing to apply the covenant of good faith and fair dealing to the arbitration agreement at issue. In impliedly presuming EDSI would provide arbitration services in bad faith, the Sixth Circuit turned the FAA's presumption of arbitrability on its head, evincing the anachronistic judicial hostility to arbitration which this Court has consistently rejected.

A. THE SIXTH CIRCUIT ERRED IN PRESUMING ARBITRAL BIAS, RATHER THAN REQUIRING PROOF OF BIAS, AS THIS COURT AND FOUR OTHER CIRCUITS HAVE DONE.

In making structural bias attacks against arbitration, an opponent cannot rely on presumptions, but instead, must present actual evidence of arbitral bias. This is the controlling standard under Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) (rejecting generalized attacks on arbitration as resting on unfounded judicial suspicion of arbitration). At least four circuit courts have either expressly or impliedly recognized this standard. The rationale for this rule is clear from this Court's decisions: the Federal Arbitration Act was designed in part to overcome anachronistic judicial hostility towards arbitration. The Sixth Circuit rejected this standard and refused to enforce a valid arbitration contract based on nothing more than unsupported allegations and presumption of bias in the EDSI arbitral forum.

In sharp contrast to the analysis undertaken in Gilmer, the Sixth Circuit's decision was based on nothing more than its poorly-disguised hostility to arbitration, rather than analytical proof of actual bias. The court's discrimination against arbitration is evident by its unstated presumption that EDSI would act in bad faith in providing an arbitral forum. Like most arbitration services, EDSI reserved itself the right to amend the arbitration rules and procedures from time to time, without input from the employee. The same right to amend existed under the NASD rules and procedures which this Court endorsed in Gilmer. Nonetheless, holding this reservation of power to be a fatal defect, the Sixth Circuit,

with no evidentiary support whatsoever, concluded that EDSI would abuse its discretion in providing a neutral arbitral forum. The Sixth Circuit's concern that EDSI would misuse its power to amend the arbitration procedures by promulgating biased rules or enforcing existing rules in a biased manner was simply a red herring, with no basis in fact or law.

Both Gilmer and the FAA itself allow a party two separate opportunities to make arbitral bias claims. Attacks brought prior to the arbitration hearing are analyzed for structural bias (see generally Gilmer at 30-31), while attacks made after the arbitration decision are analyzed for "evident partiality or corruption in the arbitrators." Id. (citing 9 U.S.C. §10). For pre-award bias challenges, as here, Gilmer requires some evidentiary showing of bias to supplement a party's mere speculation: plaintiff "first speculates that arbitration panels will be biased. However, 'we decline to indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious and impartial arbitrators.'" Id. at 30 (citation omitted). The type of generalized attacks on arbitration expressed by the Sixth Circuit are to be rejected because the FAA's

> purpose was to place an arbitration agreement 'upon the same footing as other contracts where it belongs,' . . . and to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate. . . . Some centuries ago, because of the jealously of the English courts for their own jurisdiction, they refused to enforce specific agreements to arbitrate upon the ground that the courts were thereby ousted from their jurisdiction. This jealousy survived for so long a period that the principle

> became firmly embedded in the English common law and was adopted with it by the American courts.

Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 219-221, n.6 (1986) (citing legislative history of the FAA); see also Gilmer at 30 ("[I]n our recent arbitration cases we have already rejected most of these arguments" against arbitration as insufficient.).

In addressing the arbitral bias claims before it, the Gilmer Court analyzed the protections in the arbitration rules and procedures. The Court concluded with the observation that "[t]here has been no showing in this case that those provisions are inadequate to guard against potential bias." Id. at 31 (emphasis added). The Supreme Court rejected Gilmer's invitation to presume bias. Rather, the Court upheld the plaintiff's arbitration obligation because he failed to "show" actual bias in the NASD system.

Since Gilmer, at least four circuit courts have squarely addressed arbitral bias challenges. In Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465 (D.C. Cir. 1997), the DC Circuit heid that federal statutory rights include both the substantive protections granted under the statute and access to a neutral forum in which to enforce those rights. Id. at 1482. According to the DC Circuit, because minimal standards of procedural fairness have to be satisfied before a civil action is stayed, a court should analyze arbitration rules to see if they are sufficiently neutral and provide adequate safeguards against bias. Id. at 1483. In Cole, unlike the Sixth Circuit in this matter, the DC Circuit Court scrutinized the arbitral procedures before it and found that they satisfied Gilmer.

Next, in Koveleskie v. SBC Capital Markets, Inc., 167 F.3d 361 (7th Cir. 1999), the plaintiff opposed arbitration, arguing that the system in the securities industry was biased against employees. More particularly, the plaintiff contended that arbitrators were not obligated to follow the law, would try to subvert Title VII's fee shifting principle, and there would be inadequate judicial review of the award. The Seventh Circuit rejected all of these arguments, stating:

> Gilmer left open a door for plaintiffs to challenge mandatory arbitration of statutory claims by showing that [the] arbitration system is structurally biased. However, we hold that Koveleskie has failed to show actual bias in the securities arbitration process.

Id. at 366 (emphasis added). Like the DC Circuit, the Seventh Circuit actually scrutinized the arbitration rules for neutrality rather than simply presuming bias as the Sixth Circuit did in this matter.

In Rosenberg v. Merrill Lynch, 170 F.3d 1 (1st Cir. 1999), the plaintiff-employee alleged that the NYSE arbitration system was biased against employees in favor of the routine litigants--the employers. The First Circuit emphatically rejected this argument, holding that the employee failed to demonstrate actual bias or structural infirmities in the arbitration system. According to the First Circuit, under Gilmer, arbitration should be ordered unless there has been "a showing of actual bias." Id. at 38. Like the DC and Seventh Circuit, the First Circuit actually scrutinized the arbitration rules for neutrality rather than presuming bias with no evidentiary basis as did the Sixth Circuit in this matter.

In Hooters of Am., Inc. v. Phillips, 173 F.3d 933 (4th Cir. 1999), the employer itself (rather than a third party as in the securities industry, or in the case at bar) conducted its own "in-house" arbitration system. Instead of summarily striking down the arbitration system for unfounded suspicions of bias, as the Sixth Circuit did in this matter, the Fourth Circuit, like the DC, First, and Seventh Circuits, adhered to Gilmer, not only analyzing, but making conclusions, as to the fairness of the arbitration rules before it. Id. at 939-40.

Contrary to Gilmer, and the decisions of the First, Seventh, Fourth and DC Circuits, the Sixth Circuit announced a rule peculiar to that circuit, which exemplifies the very "anachronistic judicial hostility to agreements to arbitrate" that this Court has consistently rejected. See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626 at n.14 (1985). The Sixth Circuit stated:

> We have serious reservations as to whether the arbitral forum provided under the current version of the EDSI Rules and Procedures is suitable for resolution of statutory claims. Specifically, the neutrality of the forum is far from clear in light of the uncertain relationship between Ryan's and EDSI. Floss and Daniels suggest that EDSI is biased in favor of Ryan's and other employers because it has a financial interest in maintaining its arbitration service contracts with employers. Though the record does not clearly reflect whether EDSI, in contrast to the American Arbitration Association, operates on a for-profit basis, the potential for bias exists. In light of EDSI's role in determining the pool of potential arbitrators, any such bias would render the

> arbitral forum fundamentally unfair. . . . Though obligated to provide some type of arbitral forum, EDSI has unfettered discretion in choosing the nature of that forum. . . . [and] EDSI has reserved the right to alter the applicable rules and procedures without any obligation to notify, much less receive consent from . . . [plaintiff-employees].

(App. A, *infra*, 14a-15a, 18a-19a.) The Sixth Circuit's analysis plainly demonstrates a standard for analyzing arbitration agreements that applies a presumption of bias without requiring any actual evidence of bias. Gilmer allows no such presumption.

Gilmer not only gives arbitration opponents the chance to prove bias before the hearing, but also recognizes that arbitral bias can be protected against a second time--through judicial review after the hearing. Gilmer, 500 U.S. at 30 (Under §10 of the FAA, reviewing "courts may overturn arbitration decisions 'where there [is] evident partiality or corruption in the arbitrators.'") (internal citations omitted); see also Apperson v. Fleet Carrier Corp., 879 F.2d 1344, 1358-60 (6th Cir. 1989) (The federal courts need not defer to such arbitration awards which are the result of evident partiality or deny participants minimum levels of integrity.).

Accordingly, based on Gilmer and other circuit decisions, the Sixth Circuit erred on two levels. First, the Floss decision squarely conflicts with Gilmer's approach to pre-award structural attacks on arbitration--the opponent must present sufficient evidence of structural bias to justify striking down an otherwise enforceable contract. Gilmer, at 30-31; see, e.g., Rosenberg, 170 F.3d. at 14 (Gilmer requires showing of actual bias); Koveleskie, 167 F.3d at 366 (plaintiff

"failed to show actual bias"). Second, the Floss decision ignores § 10 of the FAA and Gilmer's recognition of judicial review of arbitral bias claims after the award has been announced. Contrary to this precedent, the Sixth Circuit promulgated a new and unworkable anti-arbitration standard unique to that circuit: arbitration systems will be presumed biased, before any arbitration takes place, without any proof, evidentiary showing, or objective judicial inquiry into the adequacy of the procedures, solely because the arbitration provider reserves the right to amend its own rules and procedures to address changes in the law. The Sixth Circuit now requires District Courts to presume that if an arbitration provider retains authority to revise its own operating procedures, the provider will exercise this authority in a manner so biased against employees as to render the underlying arbitration contract unenforceable.

The linchpin of the Sixth Circuit's decision was that the arbitration services provider reserved to itself the right to amend the rules without the permission of the other party to the contract, the employee. The Sixth Circuit found this to be too much, impliedly presuming that EDSI would use such power in bad faith so as to render its promises illusory. This conclusion ignores the reality that in other nationwide third-party arbitration systems, e.g. AAA or those in the securities industry, the employee bringing a claim generally has no say as to the applicable rules. Compare Cole, 105 F.3d at 1482 n.9 (discussing employer's ability to structure arbitration procedures).

The Sixth Circuit demonstrated open hostility toward arbitration. The Court's presumption against arbitration should not be countenanced.

B. THE COURT OF APPEALS MISINTERPRETED THE FEDERAL COMMON LAW OF ARBITRATION BY REFUSING TO IMPLY THE COVENANT OF GOOD FAITH INTO A CONTRACT FALLING UNDER THE FAA.

The substantive federal law of arbitration should require that the covenant of good faith and fair dealing be implied into every contract falling under the FAA. Accord Gilmer at 30 (rejecting the presumption that parties are unable to retain "competent, conscientious and impartial arbitrators" (internal citations omitted)). This contract rule of general applicability promotes the Act's underlying policy of favoring arbitration agreements. Here, the Sixth Circuit completely ignored the covenant, presumed bias, and thereby violated the substantive federal law of arbitration.

Enacted in 1925, the FAA evinces the "liberal federal policy favoring arbitration agreements. . . ." Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983). The Act's underlying policy is to guarantee the enforcement of private contractual arrangements. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 625 (1985). Moreover, because Congress's preeminent purpose was to enforce private agreements, the Act requires courts to rigorously enforce agreements to arbitrate. Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 221 (1985).

The Act creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 26 at n.32 (1983). This substantive

federal law of arbitrability applies to any arbitration agreement within the FAA's coverage. Id. at 24; see also, Allied-Bruce Terminix Companies, Inc. v. Dobson, 115 S.Ct. 834, 838 (1995) (holding prior Supreme Court decision and agreeing "that the Act set forth substantive law"); Perry et al. v. Thomas, 482 U.S. 483, 492 at n.9 (1987) (enforcing Section 2 of the FAA which "provides the touchstone for choosing between state-law principles and the principles of federal common law envisioned by the [FAA]"); Southland Corp. et al. v. Keating et al., 465 U.S. 1, 15 at n.9 (1984) ("While the Federal Arbitration Act creates federal substantive law requiring the parties to honor arbitration agreements, it does not create any independent federal-question jurisdiction. . . .").

The substantive federal law of arbitration is a rare example of the type of situation in which this Court has held that federal common law should be adopted. These unusual circumstances "fall into essentially two categories: those in which a federal rule of decision is 'necessary to protect uniquely federal interests,' and those in which Congress has given the courts the power to develop substantive law." Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640 (1981) (internal citations omitted).

Once the decision is made that federal common law is applicable, the choice is often whether or not to displace the law of the forum state. Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d §4514 at 458-459 (1996). As Justice Scalia put it, "it might be simpler to conceptualize the issue as simply whether to apply a federal rule, which preempts rather than adopts the parallel state law, or to apply the law of the forum state." Id. at 459 (citing O'Melveny & Myers v. FDIC, 512 U.S. 79, 86 (1994)). The applicable common law here, subject to exceptions outlined

below, is that under the FAA, arbitration contracts are analyzed under the forum state's law if that law arose to govern issues concerning the validity, revocability, and enforcement of contracts generally. Perry v. Thomas, 482 U.S. 483, 492 (1987).

Because the Act establishes a "broad principle of enforceability," Southland Corp. v. Keating, 465 U.S. 1, 11 (1984), a paramount principle under the common law of arbitration is that, in interpreting arbitration contracts, as a matter of federal law, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." Moses H. Cone Memorial Hosp., 460 U.S. 1, 24-25 (1983). This principle has also been referred to as the presumption of arbitrability under the FAA. See Wright v. Universal Maritime Service Corp. et al., 142 L.Ed.2d 361, 369 at n.1 (1998) (In discussing the presumption of arbitrability under the NLRA, this Court "also discerned a presumption of arbitrability under the FAA."). "Absent a well-founded claim that an arbitration agreement resulted from the sort of fraud or excessive economic power that 'would provide grounds for the revocation of any contract,' the Act 'provides no basis for disfavoring agreements to arbitrate statutory claims by skewing the otherwise hospitable inquiry into arbitrability.'" Shearson/American Express, Inc., et al. v. McMahon et al., 482 U.S. 220, 226 (1987) (internal citations omitted).

One circuit has already recognized that the covenant of good faith applies to arbitration contracts. In Hooters, the Fourth Circuit held that the arbitration services provider has

> a duty to perform its obligations in good faith. . . . 'The courts could leave all discretion in [contract] performance unbridled. . . . No U.S. court now takes this approach. . . . [C]ontractual discretion is presumptively bridled by the law of contracts--by the covenant of good faith implied in every contract.' . . . Good faith 'emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party.'

Id. at 940 (internal citations omitted).

Here, the Sixth Circuit ignored the covenant of good faith that operates to limit EDSI's discretion in amending its rules and procedures. The Sixth Circuit's refusal to apply the covenant of good faith is at odds with its prior decisions which recognize that the covenant of good faith and fair dealing is present in every contract. See, e.g., Permanence Corp. v. Kennametal, Inc., 908 F.2d 98, 100 at n.2 (6th Cir. 1990). There is no basis for the Sixth Circuit's decision to treat arbitration contracts differently from all other contracts. If anything, with the liberal federal policy favoring arbitration, this Court's decisions would require that the covenant of good faith be read into every arbitration contract with at least as much enthusiasm as other contracts.

Proper application of the covenant of good faith and fair dealing would have required that the arbitration contracts at issue in this matter be enforced. Under the covenant of good faith, EDSI's ability to amend the rules is presumed valid because it would be presumed that EDSI would exercise its authority in good faith rather, as presumed by the Sixth Circuit, in a manner hostile to the fair resolution of claims.

The covenant is a check, a limitation on EDSI's ability to make unfair rule changes. Because the covenant of good faith operates to create this limit on EDSI's discretion, until unfair rules or procedures are demonstrated, the mere ability to modify rules cannot by itself be evidence of bad faith or bias against employees.

The Sixth Circuit's disregard of the covenant of good faith as a limit on EDSI's authority to amend and its resulting presumption that EDSI would exercise its authority in bad faith to prejudice claimants, is inconsistent with Gilmer, the FAA, and general contract law. Accordingly, the Sixth Circuit's flawed analysis should be rejected.

C. THE SIXTH CIRCUIT VIOLATED § 2 OF THE FAA BY CONSTRUING COMMON LAW CONTRACT PRINCIPLES IN A DISCRIMINATORY MANNER HOSTILE TO ARBITRATION AGREEMENTS.

Just as state legislatures may not pass laws which discriminate against arbitration contracts, federal courts may not construe common law contract principles in a discriminatory manner so as to invalidate arbitration contracts. Here though, the Sixth Circuit did precisely that, thereby violating section 2 of the FAA. This Court has previously and unequivocally proscribed this type of arbitration hostility:

> [a] court may not, then, in assessing the rights of litigants to enforce an arbitration agreement, construe that agreement in a manner different from that in which it otherwise construes

> nonarbitration agreements under state law. Nor may a court rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what we hold today the legislature cannot.

Perry et al. v. Thomas, 482 U.S. 483, 492 (1987).

The forum state's contract law principles generally apply to the interpretation of arbitration agreements. Perry v. Thomas, 482 U.S. 483, 492 (1987) (". . . [S]tate law, whether of legislative or judicial origin, is applicable if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally."); First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944 (1995) (the FAA preempts state law which treats arbitration contracts differently than other types of contracts); Allied-Bruce Terminix Companies, Inc. v. Dobson, 115 S.Ct. 834, 843 (1995) ("What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause."); Southland Corp., et al. v. Keating et al., 465 U.S. 1, 16 (1984) ("In creating a substantive rule applicable in state as well as federal courts, Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements.") (footnotes omitted).

While the laws of the forum state apply, the FAA preempts laws, either legislative or judicial in origin, which discriminate against arbitration agreements. There have been two instances in which the Court found the FAA was violated where the forum's state statutes discriminated against arbitration agreements. See, e.g., Perry v. Thomas, 482 U.S.

483, 490 (1987) (finding that the FAA preempted a state statute which rendered unenforceable private agreements to arbitrate certain wage collection claims); Doctor's Associates, Inc. v. Casarotto, 116 S.Ct. 1652 (1996) (FAA preempted a state law requiring special notice for arbitration contracts because the requirement did not apply to contracts generally). This Court has also found that the FAA preempted a state law, which, though facially neutral, was applied in a discriminatory manner against arbitration agreements. Southland Corp., et al. v. Keating et al., 465 U.S. 1 (1984) (finding preempted a state statute which rendered agreements to arbitrate certain franchise agreements unenforceable).

Southland Corp is controlling in this matter, though this time it is a federal circuit court, rather than a state court, which is bending the law to invalidate arbitration agreements. The Sixth Circuit's anti-arbitration construction is readily apparent through the following:

(1) The Sixth Circuit contract law analysis is completely silent as to the covenant of good faith and fair dealing, though both Tennessee and Kentucky have long held that the covenant is implied in every contract; see Ranier v. Mt. Sterling Nat'l Bank, 812 S.W.2d 154 (Ky. 1991); Wallace v. Nat'l Bank of Commerce, 938 S.W.2d 684 (Tenn. 1996);

(2) The Sixth Circuit's contract law analysis is completely silent as to the covenant of good faith and fair dealing, though a Fourth Circuit case applying the FAA and Gilmer expressly based its ruling on its conclusion that the covenant of good faith is implied into every contract, including arbitration contracts. Hooters, 173 F.3d 933;

(3) The Sixth Circuit's contract law analysis is completely silent as to the covenant of good faith and fair dealing, despite its own precedents that expressly recognized that the covenant of good faith is implied into every contract. Permanence Corp., 908 F.2d at 100 at n.2 (every contract contains the "implied covenant of good faith performance and fair dealing.");

(4) The Sixth Circuit presumed, without any evidentiary support whatsoever, that EDSI would exercise its rights to change the arbitration rules in an arbitrary manner; though the FAA's "baseline" presumption is the opposite--to presume arbitrability;

(5) The linchpin of the Sixth Circuit's contract law analysis regarding illusory promises, was neither state law nor federal law, but rather the court's selective reading of a treatise, Williston on Contracts; the court failed to mention that even professor Williston recognized that the covenant of good faith is implied in every contract.

The Sixth Circuit's decision is the embodiment of judicial hostility towards arbitration. This Court's analysis in Southland Corp. will not tolerate the Sixth Circuit's arbitrary misapplication of state contract law principles in a manner to achieve its anti-arbitration agenda. The Sixth Circuit's analysis turned the FAA on its head; though the statute requires a court to presume an arbitration contract to be enforceable, the Sixth Circuit applied the opposite presumption and then misapplied general contract principles to create the illusion that it was acting in conformity with § 2 of the FAA.

CONCLUSION

For the foregoing reasons, this Court should reverse the Sixth Circuit's decision and remand in these two cases.

Respectfully submitted,

/s/_____
Stephen F. Fisher
JACKSON, LEWIS, SCHNITZLER
& KRUPMAN
2100 Landmark Building
301 N. Main Street
Greenville, South Carolina 29601-2122
(864) 232-7000

ATTORNEYS FOR PETITIONER
RYAN'S FAMILY STEAK HOUSES, INC.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Filed May 1, 2000]

Nos. 99-5099/5187

99-5099	)
	)
Sharon Floss,	)
Plaintiff-Appellant,	)
	)
v.	)
	)
Ryan's Family Steak Houses, Inc., et al.,	)
Defendants-Appellees.	)
99-5187	)
	)
Kyle Daniels,	)
Plaintiff-Appellee,	)
	)
v.	)
	)
Ryan's Family Steak Houses, Inc.,	)
Defendant-Appellant.	)

Appeal from the United States District Court
for the Eastern Districts of Kentucky at Covington
and Tennessee at Knoxville.
Nos. 98-00038; 98-00294--William O. Bertelsman
and R. Leon Jordan, District Judges.

Argued: March 9, 2000

Decided and Filed: May 1, 2000

Before: MARTIN, Chief Judge; SUHRHEINRICH, Circuit Judge; GWIN, District Judge.*

OPINION

GWIN, District Judge. With these appeals, consolidated for purposes of decision, the Court reviews whether employees effectively waived their rights to bring actions in federal court under the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.* ("ADA"), and the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.* ("FLSA"). At the district court, the plaintiffs attempted to sue their former employer, Ryan's Family Steak Houses, Inc. ("Ryan's"). However, when applying for employment at Ryan's, both plaintiffs had signed a form indicating they would arbitrate all employment-related disputes. In both cases, Ryan's filed a motion to compel arbitration.

---

* The Honorable James S. Gwin, United States District Judge for the Northern District of Ohio, sitting by designation.

Finding no valid arbitration agreement, the United States District Court for the Eastern District of Tennessee refused to require Plaintiff-Appellee Kyle Daniels to arbitrate his claim under the ADA. In contrast, the United States District Court for the Eastern District of Kentucky found that Plaintiff-Appellant Sharon Floss was required to arbitrate her dispute and could thus not pursue her claim under the FLSA in federal court.

Ryan's now appeals the district court's refusal to require Daniels to arbitrate his ADA claim. Similarly, Floss appeals the district court's order requiring her to submit her FLSA claim to arbitration. Because we find neither Daniels nor Floss validly waived their right to bring an action in federal court, we **REVERSE** the district court's order requiring Floss to arbitrate her claim, and **AFFIRM** the district court's order refusing to require Daniels to submit his claim to arbitration.

I.

In support of its argument that the plaintiffs agreed to waive their right to bring an action in federal court and instead agreed to arbitrate all employment disputes, Ryan's relies upon a document identified as the "Job Applicant Agreement to Arbitration of Employment-Related Disputes." Ryan's includes this purported agreement in its employment application packet. Only those applicants who sign the

agreement are considered for employment at Ryan's.[1] Both Daniels and Floss acknowledge signing the agreement.

The employee's agreement to arbitrate is not with Ryan's. Instead, the agreement runs between the employee and a third-party arbitration services provider, Employment Dispute Services, Inc. ("EDSI"). In the agreement, EDSI agrees to provide an arbitration forum in exchange for the employee's agreement to submit any dispute with his potential employer to arbitration with EDSI. Although Ryan's is not explicitly identified as a party to the agreement, the agreement says the employee's potential employer is a third-party beneficiary of the employee's agreement to waive a judicial forum and arbitrate all employment-related disputes.

The agreement gives EDSI complete discretion over arbitration rules and procedures. The agreement says that all arbitration proceedings will be conducted under "EDSI Rules and Procedures." The agreement then gives EDSI the unlimited right to modify the rules without the employee's consent.

In July 1994, Kyle Daniels applied for employment with Ryan's and received this agreement as part of the

---

[1] A notice on the inside cover of the packet informs applicants that they must agree to the terms and conditions outlined in the agreement in order to be considered for employment with Ryan's.

employment application packet.[2] Similarly, Ryan's gave Sharon Floss the agreement when she applied for employment in December 1997. Both Daniels and Floss signed the agreement and began their employment at Ryan's shortly thereafter.

Daniels ceased working at Ryan's on August 13, 1997. On that date, Daniels claims he attempted to resume his employment with Ryan's after taking a medical leave to treat his viral hepatitis. However, Daniels says Ryan's terminated him upon his return to the restaurant.

Floss ceased working at Ryan's on January 23, 1998. Floss left her position with Ryan's after a confrontation with two management employees. According to Floss, these management employees intimidated and harassed her after learning that she had complained to the United States Department of Labor regarding Ryan's pay practices.

On February 17, 1998, Floss sued Ryan's in the United States District Court for the Eastern District of Kentucky for violation of the Fair Labor Standards Act.[3]

---

[2] The agreement received by Daniels designated Employment Dispute Resolution, Inc. ("EDR") as the arbitration services provider. EDR is now apparently referred to as Employment Dispute Services, Inc. ("EDSI").

[3] Floss also asserted state-law claims for false imprisonment and intentional infliction of emotional distress, naming as codefendants the two management employees involved in the alleged confrontation.

Floss claimed that Ryan's (1) did not pay employees legally-required minimum and overtime wages, (2) failed to pay employees for certain hours worked, and (3) retaliated against her because she complained of these practices to the United States Department of Labor. Floss sued in both her individual capacity and on behalf of similarly-situated Ryan's employees.

On May 19, 1998, Daniels filed his action against Ryan's in the United States District Court for the Eastern District of Tennessee. In this action, Daniels asserted a claim under the ADA, alleging that Ryan's terminated him on account of his handicapped status despite his ability to perform the essential functions of his job with or without reasonable accommodation.[4]

In both actions, Ryan's filed motions to compel arbitration. In ruling on these motions, the respective district courts reached different conclusions as to whether the agreements were enforceable.

In Daniels's action, the district court ruled that the agreement was not enforceable. The court reasoned that EDSI did not provide Daniels with any consideration for his promise to arbitrate his dispute with Ryan's. Though EDSI promised to provide an arbitration forum, the court found that only Ryan's and EDSI, rather than Daniels, actually benefitted from that promise. The court also found that the arbitration document did not bind EDSI. Specifically, the court noted that the agreement gave EDSI an unlimited right

---

[4] Daniels also asserted a claim under a state disability discrimination statute.

to unilaterally modify or amend the rules and procedures of the arbitration proceeding without providing notice to Daniels. Finally, the court noted that even if enforceable, the agreement was not sufficiently clear so as to represent a knowing and intelligent waiver of Daniels's right to pursue his disability discrimination claim in federal court.

However, the district court in Floss's case enforced the agreement.[5] The court rejected Floss's argument that claims under the FLSA could not be made subject to mandatory arbitration.

Both Ryan's and Floss now appeal the rulings adverse to them.

II.

Before turning to the merits of these appeals, we consider whether Floss timely filed her notice of appeal. Ryan's says Floss failed to file her appeal within thirty days of the issuance of the final order from which she appeals, as required by Federal Rule of Appellate Procedure 4(a)(1)(A).

---

[5] The district court enforced the agreement under the Federal Arbitration Act ("FAA"). *See* 9 U.S.C. § 2. The FAA authorizes federal district courts to stay a proceeding if any matter raised therein is subject to an arbitration agreement and to issue an order compelling arbitration if a party has filed suit in contravention of an arbitration agreement. *See* 9 U.S.C. §§ 3 and 4.

On October 20, 1998, the district court issued an order staying Floss's FLSA action pending arbitration. On December 21, 1998, the court, at Floss's request, issued a final order dismissing her action. Floss filed her notice of appeal on January 21, 1999.

Ryan's says that the district court's order granting a stay constituted a final order with regard to the arbitrability of Floss's FLSA claim. The second order dismissing Floss's action was, according to Ryan's, superfluous. Because Floss did not file her notice of appeal within thirty days of the stay order, Ryan's argues that Floss's appeal is untimely.

We disagree. Floss could not have filed a notice of appeal based on the district court's stay order. An interlocutory order granting a stay pending arbitration is not appealable. *See* 9 U.S.C. § 16(b); *Arnold v. Arnold Corp.*, 920 F.2d 1269, 1275 (6th Cir. 1990) (noting that interlocutory order directing parties to arbitrate dispute is not appealable). And contrary to Ryan's suggestion, the district court's stay order was interlocutory rather than final.[6] "[A] final order is one that dismisses an action in deference to arbitration." *Arnold*, 920 F.2d at 1275 (internal quotations omitted). The district court's stay order did no such thing.

---

[6] This court has found that a stay order may constitute a final order when the stay delays the enforcement of a judgment pending the clarification of that judgment. *See M&C Corp. v. Erwin Behr GmbH & Co.*, 143 F.3d 1033, 1036-37 (6th Cir. 1998). Such is not the case here.

Floss filed her appeal within thirty days of the district court's final order dismissing her action; therefore, her appeal is timely.

III.

We review *de novo* a district court's decisions regarding both the existence of a valid arbitration agreement and the arbitrability of a particular dispute. *See Bobbie Brooks, Inc. v. Int'l Ladies' Garment Workers Union*, 835 F.2d 1164, 1170 (6th Cir. 1987) (stating that district court's finding that a contract exists is subject to *de novo* review); *M&C Corp. v. Erwin Behr GmbH & Co.*, 143 F.3d 1033, 1037 (6th Cir. 1998) ("A determination of the arbitrability of a dispute is subject to *de novo* review.").

IV.

In deciding whether to compel arbitration of a federal statutory claim, we initially consider whether the statutory claim is generally subject to compulsory arbitration. If the statutory claim is not exempt from mandatory arbitration, we next consider whether the parties have executed a valid arbitration agreement and, if so, whether the statutory claim falls within the scope of that agreement. *See Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc.*, 473 U.S. 614, 628, 105 S.Ct. 3346, 3355, 87 L.Ed.2d 444 (1985) (stating that courts should consider both whether the parties have agreed to arbitrate a federal statutory claim and whether that claim is generally subject to compulsory arbitration).

A.

Mandatory arbitration of federal statutory claims continues to generate considerable debate among courts and commentators. At bottom, this debate centers on the efficacy of resolving "*public disputes in private fora*." Harry Edwards, *Where Are We Heading With Mandatory Arbitration of Statutory Claims in Employment?*, 16 Ga. St. U. L. Rev. (forthcoming April 2000) (emphasis in original).

With its informal nature, arbitration is widely-accepted as a sound method for resolving essentially private disputes, such as those arising from collective bargaining agreements and other contracts. Yet, for some, this informality renders arbitration suspect as a forum for resolving statutory claims, which typically implicate important public interests. As one jurist and commentator has explained:

> When public laws are enforced in private fora, however, we have no assurance that the underlying *public interests* are fully satisfied. This is not to say that private fora are incapable of resolving disputes in a manner protective of the public interest. However, conflicts that are resolved through mediation and arbitration usually are not subject to public scrutiny, so we do not know whether such resolutions are consistent with prevailing interpretations of public law or whether the procedures followed were inequitable.

Id. (emphasis in original) (footnote omitted).

For a time, skepticism regarding the role of arbitration in resolving statutory claims held sway. This skepticism is perhaps best reflected in the Supreme Court's approach to the mandatory arbitration of statutory claims. The Court rejected arbitration as the lone forum for vindicating claims under Title VII of the 1964 Civil Rights Act and the Securities Act of 1933. *See Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47, 94 S.Ct. 1011, 1019, 39 L.Ed.2d 147 (1974); *Wilko v. Swan*, 346 U.S. 427, 438, 74 S.Ct. 182, 188-89, 98 L.Ed. 168 (1953). In so holding, the Court explained that arbitrators' inexperience with legal concepts coupled with the lack of stringent procedural safeguards rendered an arbitral forum, in the context of the statutory claims at issue, an unsuitable replacement for a court of law. *See Gardner-Denver*, 415 U.S at 57; *Wilko*, 346 U.S. at 435-36.

However, the tide soon turned. In a trio of cases decided in the 1980s, the Supreme Court enforced arbitration agreements covering claims under the Sherman Act, *see Mitsubishi Motors Corp.*, 473 U.S. at 640, the Securities Act of 1933, *see Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 483, 109 S.Ct. 1917, 1921, 104 L.Ed.2d 526 (1989), the Securities Exchange Act of 1934, *see Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 238, 107 S.Ct. 2332, 2344, 96 L.Ed.2d 185 (1987), and the civil provisions of the Racketeering Influenced Corrupt Organizations Act ("RICO"), *see McMahon*, 473 U.S. at 242. These holdings led the Court to declare in 1991 that "[i]t is now well settled that statutory claims may be the subject of an arbitration agreement, enforceable by the FAA." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26, 111 S.Ct. 1647, 1652, 114 L.Ed.2d 26 (1991).

The Court addressed its growing acceptance of mandatory arbitration for statutory claims in *Gilmer v. Interstate/Johnson Lane Corp.*, in which the Court upheld the mandatory arbitration of claims under the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq*. *See id.* at 27. In permitting the compulsory arbitration of statutory claims, the Court recognized that by "'agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.'" *Id.* at 26 (quoting *Mitsubishi*, 473 U.S. at 628). And the Court dismissed generalized attacks on the suitability of arbitral fora as arising from a "'suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants.'" *Id.* at 30 (quoting *Rodriguez de Quijas*, 490 U.S. at 481). Such a suspicion, the Court observed, was "far out of step" with the "current strong endorsement" of arbitration. *Id.*

Yet not all statutory claims are amenable to mandatory arbitration. *See Mitsubishi*, 473 U.S. at 627-28. In creating a statutory cause of action, Congress may choose to mandate a judicial forum for its resolution. *See id.* at 628. Such an intent is typically evidenced in the statutory text, legislative history, or by an "inherent conflict" between arbitration and the underlying purposes of the statute. *McMahon*, 482 U.S. at 227.

Here, Floss argues that a conflict exists between arbitration and her claim under the FLSA. Specifically, Floss insists that an arbitral forum does not sufficiently allow for the furtherance of the important social policies implicated by the minimum wage provisions of the FLSA. Floss contends that a claim under these provisions involves not only an attempt to receive an individual remedy, but also an effort to

promote a minimum standard of living for the nation's lowest paid workers. According to Floss, requiring a party to seek resolution of a minimum wage claim under the FLSA in an arbitral forum will thwart the latter objective.

Floss's argument does not persuade. Though a claim under the FLSA certainly serves a purpose beyond providing relief to an individual claimant, we fail to see how the broader policies furthered by such a claim are hindered when that claim is resolved through arbitration. As the Supreme Court has held, both judicial and arbitral fora "can further broader social purposes." *Gilmer*, 500 U.S. at 28. Indeed, the Court has upheld the compulsory arbitration of various statutory claims that further both individual and societal interests, including claims under the Sherman Act and RICO. Floss offers no compelling reason for drawing a distinction between these statutes and the FLSA.

However, even if arbitration is generally a suitable forum for resolving a particular statutory claim, the specific arbitral forum provided under an arbitration agreement must nevertheless allow for the effective vindication of that claim. Otherwise, arbitration of the claim conflicts with the statute's purpose of both providing individual relief and generally deterring unlawful conduct through the enforcement of its provisions. *See Gilmer*, 500 U.S. at 28 ("[S]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.") (quoting *Mitsubishi*, 473 U.S. at 637).

Both Floss and Daniels argue that the specific arbitration forum provided by the current version of the EDSI

Rules and Procedures does not allow them to effectively vindicate their claims under the FLSA and the ADA. They say the procedures allow for the appointment of a biased and incompetent panel of arbitrators,[7] as well as unduly limit the participants' discovery opportunities.

We have serious reservations as to whether the arbitral forum provided under the current version of the EDSI Rules and Procedures is suitable for the resolution of statutory claims. Specifically, the neutrality of the forum is far from clear in light of the uncertain relationship between Ryan's and

---

[7] Under EDSI's current procedures, a panel of three "adjudicators" preside over ever arbitration proceeding. Each adjudicator is selected from one of three "selection pools." One pool consists of supervisors or managers of an employer who has entered into an arbitration agreement with EDSI. A second pool consists of nonsupervisory employees of an empoloyer who is a signatory to an EDSI arbitration agreement. A third pool consists of attorneys, retired judges, and "other competent professional persons" not associated with either party. If the dispute involves more than $20,000, only licensed attorneys are included in this third pool.

The selection process begins with EDSI furnishing both parties a list of potential adjudicators organized according to each selection pool. Information regarding each adjudicator's recent employment history and related biographical information is provided to the parties along with this list. The parties may then move to strike any adjudicator for cause. Following the removal of any adjudicators for cause, the parties each strike a name from the list until only one name remains from each selection pool.

EDSI. Floss and Daniels suggest that EDSI is biased in favor of Ryan's and other employers because it has a financial interest in maintaining its arbitration service contracts with employers. Though the record does not clearly reflect whether EDSI, in contrast to the American Arbitration Association, operates on a for-profit basis, the potential for bias exists. In light of EDSI's role in determining the pool of potential arbitrators, any such bias would render the arbitral forum fundamentally unfair. *See Cole v. Burns Int'l Security Services*, 105 F.3d 1465, 1482 (D.C. Cir. 1997) ("At a minimum, statutory rights include both a substantive protection and access to a neutral forum in which to enforce those protections.").

Moreover, EDSI's current rules require an employee to generally pay one-half of the arbitrators' fees as a condition of pursuing a dispute. Such a fee structure could potentially prevent an employee from prosecuting a federal statutory claim against an employer. Recognizing as much, the District of Columbia Circuit has refused to countenance an employer's requirement that employees submit their disputes to arbitration as a condition of employment absent that employer's agreement to bear the full costs of the arbitrators' fees. *See Cole*, 105 F.3d at 1484-85.

Though we have concerns with both the fee structure and potential bias of EDSI's arbitral forum, we need not decide whether these deficits prevent the arbitration of Floss and Daniels's statutory claims. As explained below, Floss and Daniels are not contractually obligated to submit their federal statutory claims to arbitration in EDSI's arbitral forum. Thus, Floss and Daniels need not establish the unsuitability of

EDSI's arbitral forum in order to litigate their statutory claims in federal court.

B.

The Federal Arbitration Act declares that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon grounds that exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. However, "the FAA was not enacted to force parties to arbitrate in the absence of an agreement." *Avedon Engineering, Inc. v. Seatex*, 126 F.3d 1279, 1286 (10th Cir. 1997). Indeed, "[t]he *sine qua non* of the FAA's applicability to a particular dispute is an agreement to arbitrate the dispute in a contract which evidences a transaction in interstate commerce." *Hartford Lloyd's Ins. Co. v. Teachworth*, 898 F.2d 1058, 1061 (5th Cir. 1990).

Floss and Daniels say the arbitration agreements they signed as part of their employment applications with Ryan's are unenforceable. In deciding whether the agreements are enforceable, we examine applicable state-law contract principles. *See Perry v. Thomas*, 482 U.S. 483, 492 n.9, 107 S.Ct. 2520, 2527 n.9, 96 L.Ed.2d 426 (1987); *Avedon Engineering, Inc.*, 126 F.3d at 1287; *Shulze and Burch Biscuit Co. v. Tree Top, Inc.*, 831 F.2d 709, 715 (7th Cir. 1987); *Coastal Indus., Inc. v. Automatic Steam Products Corp.*, 654 F.2d 375, 377-78 (5th Cir. 1981). Thus, we review both Kentucky and Tennessee law to decide if Floss and Daniels have executed valid arbitration agreements.

Consideration is an essential element of every contract. *See Price v. Mercury Supply Co.*, 682 S.W.2d 924, 933 (Tenn. Ct. App. 1984); *Cuppy v. General Accident Fire &*

Life Assurance Corp., 378 S.W.2d 629, 632 (Ky. Ct. App. 1964). In other words, a promise is legally enforceable only if the promisor receives in exchange for that promise some act or forbearance, or the promise thereof. *See Kozy v. Werle*, 902 S.W.2d 404, 411 (Tenn. Ct. App. 1995) ("Consideration consists when the promise does something that he is under no legal obligation to do or refrains from doing [that] which he has a legal right to do."); *Sutton v. First Nat'l Bank of Crossville*, 620 S.W.2d 526, 531 (Tenn. Ct. App. 1981) ("'It is invariably held that the promise of one party is a valid consideration for the promise of the other party.'") (quoting *Dark Tobacco Growers' Co-op Assn. v. Mason*, 263 S.W. 60, 67 (Tenn. 1924)); *Phillips v. Phillips*, 171 S.W.2d 458, 464 (Ky. Ct. App. 1943) (defining consideration as a legal right given to the promisor the exercise of which he is otherwise not entitled).

A promise constitutes consideration for another promise only when it creates a binding obligation. Thus, absent a mutuality of obligation, a contract based on reciprocal promises lacks consideration. *See Dobbs v. Guenther*, 846 S.W.2d 270, 276 (Tenn. Ct. App. 1992); *David Roth's Sons, Inc. v. Wright and Taylor, Inc.*, 343 S.W.2d 389, 390 (Ky. Ct. App. 1961). Put more succinctly, such a contract "must be binding on both or else it is binding on neither." *Morgan v. Morgan*, 218 S.W.2d 410, 412 (Ky. Ct. App. 1949).

Promises may fail to create legally binding obligations for a variety of reasons. *See* 17A AM. JUR. 2d *Contracts* § 139 (1991). Most notably, a promise may in effect promise nothing at all. Such an illusory promise arises when a promisor retains the right to decide whether or not to perform

the promised act. *See Trumbull v. Century Marketing Corp.*, 12 F. Supp.2d 683, 686 (N.D. Ohio 1998) (holding that employer's promise in employee handbook to arbitrate disputes did not create binding obligation when employer retains right to revoke arbitration provision); *David Roth's Sons, Inc.*, 343 S.W.2d at 391 (noting that a promise absent any fixed obligation to perform "is illusory in the sense that [the promisor] has made no legally enforceable commitment, and justice demands the other party should not be bound"). A promise is also illusory when its indefinite nature defies legal enforcement. *See Kovacs v. Freeman*, 957 S.W.2d 251, 254 (Ky. 1997) ("Under Kentucky law, an enforceable contract must contain definite and certain terms setting forth promises of performance to be rendered by each party."); *Jamestowne On Signal, Inc. v. First Federal Savings & Loan Ass'n*, 807 S.W.2d 559, 564 (Tenn. Ct. App. 1990) ("'Courts will not uphold agreements which are indefinite and uncertain as to the obligations imposed on the parties thereto.'") (quoting *Union State Bank v. Woell*, 434 N.W.2d 712 (N.D. 1989).

In the purported agreement at issue in this case, EDSI offered its promise to provide an arbitral forum as consideration for Floss and Daniels's promise to submit any dispute they may have with their employer to arbitration with EDSI. In ruling in favor of Daniels, the district court found that EDSI's promise did not create a binding obligation. We agree.

EDSI's promise to provide an arbitral forum is fatally indefinite. Though obligated to provide some type of arbitral forum, EDSI has unfettered discretion in choosing the nature of that forum. Specifically, EDSI has reserved the right to alter the applicable rules and procedures without any

obligation to notify, much less receive consent from, Floss and Daniels. EDSI's right to choose the nature of its performance renders its promise illusory. As Professor Williston has explained:

> Where a promisor retains an unlimited right to decide later the nature or extent of his performance, the promise is too indefinite for legal enforcement. The unlimited choice in effect destroys the promise and makes it merely illusory.

1 SAMUEL WILLISTON, CONTRACTS § 43, at 140 (3d ed. 1957).

EDSI's illusory promise does not create a binding obligation. The purported arbitration agreement therefore lacks a mutuality of obligation. Without a mutuality of obligation, the agreement lacks consideration and, accordingly, does not constitute an enforceable arbitration agreement.[8]

V.

Ryan's has pursued an acceptable objective in an unacceptable manner. An employer may enter an agreement with employees requiring the arbitration of all employment

---

[8] Floss insists that the district court erred in determining as a matter of law that she was not fraudulently induced to sign the agreement. Because the agreement is unenforceable on other grounds, we do not address this argument.

disputes, including those involving federal statutory claims. Yet an employer cannot seek to do so in such a way that leaves employees with no consideration for their promise to submit their disputes to arbitration. Here, we find that Floss and Daniels did not receive any consideration for their promise to arbitrate their disputes. We thus refuse to enforce their promise in favor of Ryan's.

The judgment of the United States District Court for the Eastern District of Tennessee in case 99-5187 is **AFFIRMED**, and the judgment of the United States District Court for the Eastern District of Kentucky in case 99-5099 is **REVERSED.**

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE AT KNOXVILLE

[Filed February 23, 1999]

No. 3:98-cv-294

KYLE DANIELS,
Plaintiff,

v.

RYAN'S FAMILY STEAKHOUSE, INC.,
Defendant.

ORDER

For the reasons stated in the Memorandum Opinion filed contemporaneously with this Order, it is hereby **ORDERED** that the defendant's motion to dismiss and petition to compel arbitration and stay the case [doc. 5] is **DENIED**.

ENTER:
/s/_____
Leon Jordan
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

[Filed February 23, 1999]

No. 3:98-cv-294

KYLE DANIELS,
Plaintiff,

v.

RYAN'S FAMILY STEAKHOUSE, INC.,
Defendant.

MEMORANDUM OPINION

This civil action is before the court on the defendant's motion to dismiss and petition to compel arbitration and stay the case [doc. 5]. The plaintiff has responded [doc.8], and the defendant has filed a reply brief [doc. 11]. Oral argument on the defendant's motion was heard on November 30, 1998, and thus, the motion is ripe for the court's consideration. For the reasons discussed below, the defendant's motion will be denied.

When the plaintiff applied for a job with Ryan's Family Steak Houses, he signed a document entitled, "JOB APPLICANT AGREEMENT TO ARBITRATION OF

EMPLOYMENT-RELATED DISPUTES." By its terms, the agreement purports to be a contract between the employee and a firm named Employment Dispute Resolution, Inc. (EDR). *See* doc. 6, exh. B to affidavit of James Randolph Hart, ¶B.2.C. It informs the employee that his potential employer, "Company," has entered into an agreement with EDR so that all "employment-related disputes" would be arbitrated and settled by EDR. Ryan's is not named as the employer or the "Company" anywhere in the document. Paragraph B.2.D. states that the Company is a third party beneficiary of this Agreement, so if the employee has a "claim or dispute" with the Company, then the employee must submit the claim or dispute to EDR for binding arbitration. The agreement does not define the rights, including a right to a jury trial, that the employee is waiving, nor does it describe the types of "claims or disputes" that are covered by the agreement. The agreement specifically says that the agreement is between the employee and EDR, not the "Company," but EDR is not a signatory to the agreement. The agreement informs the employee that it is not a employment contract and does not affect his "at will" employment relationship with the company.

The agreement promises that any arbitration matter will be heard and decided "under the provisions and the authority of the Federal Arbitration Act, 9 USC sec. 1, as applicable." However, the agreement also provides that any employment-related dispute must be "brought 'ONLY' in the EDR arbitration forum and under EDR Rules and Procedures, as modified or amended from time to time."

The defendant asks this court to enter an order enforcing the agreement to arbitrate, and dismissing this civil

action. In the alternative, the defendant asks that this civil action be stayed pending the outcome of arbitration. The defendant argues that the Federal Arbitration Act (FAA) provides that such agreements should be enforced if there is evidence of an executed arbitration clause. The defendant says that the agreement in this case is covered by the FAA and the plaintiff has failed to take his claim to arbitration as required by the agreement.

In response, the plaintiff argues that "contracts of employment. . .of workers engaged in foreign or interstate commerce" are not enforceable under the FAA. This argument has been addressed by the Sixth Circuit in *Asplundh Tree Expert Company v. Bates,* 71 F.3d 592, 600 (6th Cir. 1995). The Sixth Circuit found that this exclusionary clause only applies to workers directly involved in the movement of goods in interstate commerce. A restaurant server does not meet this definition, and so the plaintiff's first argument must fail.

Next, the plaintiff argues that, contrary to the defendant's assertion, this court has discretion determining the enforceability of Agreement. Section 2 of the FAA provides that such agreements are valid and enforceable "save upon such grounds as exist at law or equity for the revocation of any contract." It is this argument that saves the plaintiff's lawsuit in this forum. The court finds that the agreement in this case is not a binding contract, and that the employee could not have knowingly executed a valid waiver of his federal statutory rights, including his right to a jury trial.

First, the court finds that there is no consideration for the agreement. When asked at oral argument about the

consideration for the agreement, counsel for the defense replied that the consideration flowing to the employee is EDR's agreement to provide an arbitration forum for disputes. This benefit clearly flows only to EDR and the Company, not the employee.[1] Thus, EDR has not given the employee anything of value in exchange for the employee's promise to arbitrate his "employment-related disputes."

In *Trumbull v. Century Marketing Corp.*, 12 F. Supp. 2d 683 (N.D. Ohio 1998), the arbitration clause at issue was found in the employee handbook which the employee signed. The District Court found that there was no consideration for the "alleged arbitration agreement" because the handbook was not signed as a condition of employment, rather it was signed some time later. *Id.* at 686. In this case, signing the agreement cannot be said to be a condition of employment since EDR is not the employer, the Company is, and the agreement is between EDR and the employee, not the Company.

Second, the court finds that the agreement is non-binding because only one party, the employee, is bound. The agreement provides that the employee must submit to the EDR arbitration forum and the EDR rules and procedures, "as modified or amended from time to time." Thus, the employee is absolutely bound to arbitrate disputes with his employer and submit to whatever rules and regulations EDR chooses. By the terms of the agreement EDR is free to modify those rules

---

[1] This finding is supported by the fact that it costs the employee more to file a complaint with EDR than in federal court. *See* EDR's Rules and Regulations, Art. XIX.

and regulations at any time. In fact, at oral argument, the court was provided with a copy of EDR's rules and regulations for arbitration that had been revised in January 1998, well after the plaintiff was employed by Ryan's. Not only can EDR modify its rules and procedures regarding arbitration without notice to the employee, but EDR and the Company could modify whatever agreement they have between themselves without any obligation to notify the employee.

Like the agreement in this case, the handbook in *Trumbull* provided that the employer could modify, augment, delete or revoke any of the policies or procedures set-out in the handbook without notice to the employees. In finding that the employer was not bound by alleged contract, the District Court said:

> To give effect to this language and hold that a valid contract exists would be to create a contract where only one party is bound. The plaintiff would be bound by all the terms of the handbook while the defendant could simply revoke any term (including the arbitration clause) whenever it desired. Without mutuality of obligation, a contract cannot be enforced.

Two other points should be made about this agreement. EDR is not even a signatory of the agreement. Only the plaintiff, Kyle Daniels, signed the agreement, with an unknown party witnessing his signature. Second, the court is concerned that the Company is not identified anywhere in the agreement. The literal terms of the agreement could force

the plaintiff to arbitrate his employment disputes with any number of potential employers, not just Ryan's.

For these reasons, the court finds that the EDR agreement is a non-binding contract and cannot be enforced. However, even if the agreement was construed to be valid contract, it is this court's opinion that there has been no valid waiver by the plaintiff of his federal statutory rights including his right to a jury trial.

Although the Supreme Court and the Sixth Circuit both recognize that an individual's right to pursue a statutory employment discrimination claim in federal court can be waived in an employment contract, the waiver must at least be knowing in order to be valid. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991); *K.M.C. Co., Inc. v. Irving Trust Co.*, 757 F.2d 752, 756 (6th Cir. 1985); *Trumbull,* 12 F. Supp. 2d at 686-88. Particularly, there must be a knowing waiver of his statutory rights and his constitutional right to a jury trial, and the employee must be aware of the significance of the waiver. This is especially true because in the employer/employee context such contracts are rarely the result of bargaining between the parties. Rather, the potential employee is given such a contract to sign on a take-it-or-leave-it basis. If the employee refuses to sign -- no job. This hardly qualifies as mutual assent by the parties. *See Trumbull,* 12 F. Supp. 2d at 686.

It is a question of federal law whether a waiver of statutory and constitutional rights has been knowing and voluntary. *See K.M.C. Co.*, 757 F.2d at 755-56; *Trumbull,* 12 F. Supp. 2d at 686. A valid waiver must be knowing and

clear. *See K.M.C. Co.*, 757 F.2d at 756; *Trumbull*, 12 F. Supp. 2d at 687.

The court finds that the alleged waiver in this case was not knowing or clear. First, the language of the agreement makes no distinction between the arbitration of statutory claims as opposed to contractual disputes such as salary. Further, the agreement refers only to "employment-related disputes" or "claims or disputes with the Company." The plaintiff was not advised of the significance of the waiver, nor was he specifically informed that he was agreeing to waive his right to a jury trial. Based on the language of the agreement, the plaintiff would not necessarily have understood that important legal rights were being waived by signing the agreement.

In the absence of such knowledge, the court finds that the plaintiff did not knowingly and clearly waive his statutory and constitutional rights, and the waiver is not valid.

Therefore, for these reasons, the court finds that the defendant's motion to dismiss and compel arbitration must be denied. An order reflecting this opinion shall be entered.

ENTER:

/s/_____
Leon Jordan
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT COVINGTON

[Filed October 20, 1998]

CIVIL ACTION NO. 98-38

SHARON FLOSS, Individually and on behalf of all employees of Defendant similarly situated
Plaintiff,

v.

RYAN' S FAMILY STEAK HOUSES, INC., ET AL
Defendants.

ORDER

This matter is before the court on the Report and Recommendation of the Magistrate Judge, and having considered de novo those objections filed by plaintiff and defendants thereto, and the court being sufficiently advised,

IT IS ORDERED as follows:

1. That the objections (Docs. #21 and #22) be, and they are, hereby overruled;

2. That the Report and Recommendation (Doc. #20) be, and it is, hereby adopted as the findings of fact and conclusions of law of this court;

3. That the motions of plaintiff for order directing and defining contents (Doc. #2) and for leave to file an amended complaint (Doc. #6) be, and they are, hereby denied, without prejudice;

4. That the motion of defendant to dismiss (Doc. #3-1) be, and it is, hereby denied, without prejudice;

5. That. the motion of defendant to compel arbitration and stay proceedings (Doc. #3-2) be, and it is, hereby granted;

6. That this matter be, and it is, hereby stayed pending arbitration; and

7. That the parties are to file a status report, in the form of a pleading, on or before APRIL 20, 1999, or upon completion of arbitration, whichever shall first occur, advising the court of the status of such arbitration.

This 20th day of October, 1998.

/s/_____
WILLIAM O. BERTELSMAN, JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT COVINGTON

[Filed September 1, 1998]

CIVIL ACTION NO. 98-38

SHARON FLOSS,
Plaintiff,

v.

RYAN' S FAMILY
STEAK HOUSES, INC., et al.,
Defendants.

REPORT AND RECOMMENDATION

This case was referred to the undersigned magistrate judge for an evidentiary hearing to determine whether plaintiff was fraudulently induced into signing an otherwise valid arbitration agreement (hereinafter "Arbitration Agreement") with the defendant. See 28 U.S.C. §636(b) and 7/1/98 Order [Doc. #16]. At an evidentiary hearing held on August 25, 1998, the plaintiff testified as to her recollection of the circumstances of the agreement. The defendant also presented two managerial witnesses, Frank Santorelli and Tim Lam,

who testified as to their memory of the events which gave rise to the Agreement. Having heard the testimony presented, the court concludes that the plaintiff was not fraudulently induced into entering the Agreement, and therefore recommends that the agreement be enforced.

I. Plaintiff's Request for a Jury Trial

The plaintiff contends that this Report and Recommendation should determine only whether plaintiff has produced sufficient evidence to present her defense of fraud in the inducement of the Arbitration Agreement to a jury. Plaintiff argues that this factual issue must be resolved by a jury rather than by the undersigned magistrate judge.

Section 4 of the Federal Arbitration Act, 9 U.S.C. §4, recites in relevant part "If the making of the arbitration agreement, be in issue, the court shall proceed summarily to the trial thereof." However, a party to an arbitration agreement cannot obtain a jury trial merely by demanding one; to be entitled to a jury trial, the party "must make at least some showing that under prevailing law, he would be relieved of his contractual obligation to arbitrate if his allegations proved to be true," and "he must produce at least some evidence to substantiate his factual allegations." Dillard v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 961 F.2d 1148, 1154 (5th Cir. 1992); Topf v. Warnaco, Inc., 942 F. Supp. 762, 766 (D. Ct. 1996). In this case, the plaintiff has not met her burden of showing that she is entitled to a jury trial, because no reasonable jury could find fraudulent inducement on the evidence presented. See Doctor's Assoc., Inc. v. Stuart, 85 F.3d 975, 980 (2d Cir. 1996) (noting party's failure to show facts sufficient as a matter of law).

II. Evidence Presented

The evidence presented by the parties reveals two significant facts in dispute: 1) whether plaintiff was interviewed on December 2, 1997 by Mr. Lam or on December 3, 1997 by Mr. Santorelli; and 2) whether Mr. Santorelli falsely represented the effect of plaintiff's signature on the Arbitration Agreement. However, neither of these factual disputes requires the court to submit the issue of fraudulent inducement to a jury, because even assuming that plaintiff's version of the facts is correct, it is insufficient to show fraudulent inducement.

Mr. Santorelli and Mr. Lam, both assistant managers at Ryan's at the time of plaintiff's employment,[1] testified that signing the Arbitration Agreement is a precondition to employment with Ryan's. In fact, both managers testified that the job applicant's signature on the arbitration agreement is a precondition to the applicant obtaining an interview with Ryan's. If a job applicant declines to sign the agreement, the interview process does not go forward.

The Arbitration Agreement, entitled "Job Application Agreement to Arbitration of Employment-Related Disputes," consists of a double-sided single spaced document which clearly reflects and details the parties' agreement to arbitrate employment-related disputes. The Agreement consists of multiple paragraphs and concludes with space for the applicant's name, address and social security, number, and signature lines for the job applicant and a witness. It is

---

[1] Mr. Santorelli has since left Ryan's employ.

obvious from the language of the agreement and the placement of the signature lines that the signatory is agreeing to the terms of arbitration as provided in the Agreement.

Separated by a dotted line at the bottom of the Arbitration Agreement on the back side of the form, below the signature lines, is a separate section which gives the appearance of being detachable. The section permits the signer to check "yes" or "no" in response to the query: "Please indicate whether you wish to be considered for purposes of serving as an 'Adjudicator' and participating in hearings and deciding disputes under the EDSI[2] Rules and Procedures." Below the space for a "yes" or "no" response in the same area of the form is the statement: "Note: Your indication of interest is no assurance that you will be selected for Adjudicator training or to serve as an Adjudicator."

It is uncontroverted that the plaintiff picked up an employment application packet containing the Arbitration Agreement and the employment application on December 1, 1997. Ms. Floss took the packet home with her, read through its contents, and completed and dated all of the forms the same date. However, she testified that she initially left blank the signature line on the Arbitration Agreement because she did not fully understand it. The plaintiff testified that she

---

[2] EDSI stands for Employment Dispute Services, Inc., an entity with which Ryan's has contracted to arbitrate employment disputes. The Arbitration Agreement is actually between EDSI and the job applicant and recites that it is not intended to be "any part of an employment contract."

returned with the employment packet on December 3, 1997, whereupon she was interviewed by Frank Santorelli.

The date of the interview and name of the interviewer is contradicted by the testimony of Mr. Santorelli and Mr. Lam, as well as by the employment application and Arbitration Agreement themselves. The testimony of the Ryan's employees and the forms themselves indicate that Ms. Floss was interviewed by Mr. Lam on December 2, 1997. Mr. Lam testified that his standard practice is to affix his signature to application documents in front of the employee after verifying that all documents have been completed and signed by the applicant, including the Arbitration Agreement.

The second fact in dispute concerns what was said by Mr. Santorelli (or Mr. Lam) during the interview process. Ms. Floss testified that during the interview, she asked Mr. Santorelli to explain the portion of the Arbitration Agreement which she did not understand - specifically, the meaning of the phrase containing the work "Adjudicator" in the detachable-style section at the bottom of the form. As indicated above, the phrase asks whether the signatory wishes to be considered "for purposes of serving as an 'Adjudicator' and participating in hearings and deciding disputes under the EDSI Rules and Procedures."

In an affidavit previously filed with the court and verified through her testimony, the plaintiff stated that she "explained to [the manager] that I had strong feelings against both arbitration and unions, both of which in my belief represented a means of placing the employee's rights

secondary to either collective rights or employer rights."[3] She testified that she clearly informed the manager that she would not agree to arbitration, and signed the Arbitration Agreement only after being reassured that signing but marking the "no" box under the query asking whether she wished to be an "Adjudicator" was equivalent to declining the Arbitration Agreement. In contrast to plaintiff's testimony on this point, Mr. Lam and Mr. Santorelli expressly deny having deliberately misled the plaintiff or any other applicant as to the meaning of the Arbitration Agreement.[4]

Ms. Floss admitted that she signed an identical arbitration agreement during a brief period of employment with Ryan's in Indiana in August 1997, but claims that she would not have signed the Arbitration Agreement in Indiana if it had been explained to her.[5] However, she also admitted

---

[3] Ms. Floss, who has an eleventh grade education and her G.E.D., spoke in clear but simple language from the witness stand. Despite her repeated insistence from the witness stand that she does not "use fancy words," she also testified that the words in the affidavit were the words she spoke at the time.

[4] While Mr. Lam testified that "several" applicants had questioned him regarding the meaning of the term "adjudicator" in the phrase, he testified that his standard practice was to explain the meaning in terms which the court found to be clear and unambiguous. Of the 800 to 1,000 job applicants interviewed by Mr. Lam, none have ever refused to sign the Arbitration Agreement.

[5] Ms. Floss contradictorily responded "No, sir" when initially questioned as to whether she had agreed to arbitration in

that she signed that agreement without reading it because of her "desperate" financial circumstances.

The "Application for Employment" in the packet received by Ms. Floss clearly states in bright red, capital letters across the top of the form: "THE ENTIRE APPLICATION FORM MUST BE COMPLETED AS WELL AS THE ATTACHED ARBITRATION AGREEMENT PRIOR TO BEING CONSIDERED FOR HIRE!" In addition, a "NOTICE TO ALL APPLICANTS" on the first page of the application proclaims:

> In order for you to be considered for employment at Ryan's Family Steak Houses, Inc., you must agree to the terms and conditions in the attached Job Applicant Agreement to Arbitration of Employment Related Services ("Arbitration Agreement.") Your failure to sign and accept the Arbitration Agreement and its related EDSI Rules and Procedures will terminate the job application process.

Ms. Floss admitted in her testimony that she understood in December 1997 based upon the above language that her failure to sign the Arbitration Agreement would preclude her employment with Ryan's.

Indiana.

In addition, Ms. Floss admitted at the hearing[6] that she was provided with a copy of the arbitration Rules and Procedures to keep, but failed to review them. This court has reviewed a copy of the arbitration Rules and Procedures provided to Ms. Floss, and concludes that the meaning of the word "Adjudicator" is clear and unambiguous in those context of those rules.

III. ANALYSIS

Even taking all of Ms. Floss's allegations as true,[7] the court concludes that she cannot prevail on her claim of fraudulent inducement because any reliance on the alleged statements of Mr. Santorelli was not reasonable. See Topf, 942 F. Supp. at 768 (citing Cohen v. Wedbush, Noble, Cooke, Inc., 841 F.2d 282 (9th Cir. 1988)). The language of the employment application and of the Arbitration Agreement

---

[6] In her affidavit previously, filed with this court, the plaintiff denied receiving a copy of the Agreement or the EDSI rules; however, she acknowledged on cross-examination that she received a copy of the Agreement on December 1, 1997 to review, and thereafter received a copy of the referenced rules to keep.

[7] If the undersigned were the fact finder, I would not credit Ms. Floss's recall of the circumstances of her hiring by Ryan's, because here testimony was inconsistent and contradicted by other more credible testimony and documentary evidence. However, I do not believe that §4 permits the court to make such credibility determinations, and therefore have assumed Ms. Floss's version to be true for the purposes of this Report and Recommendation.

is clear and unambiguous. Plaintiff acknowledged reading and comprehending the language in both documents which specified that she was required to sign the Arbitration Agreement in order to be eligible for employment with Ryan's, and that her failure to agree to arbitration would preclude her employment.

Plaintiff's argument that the query asking whether she wished to be an "Adjudicator" is ambiguous is not persuasive. The term as used in the context of the sentence in which it is placed as well as the sentence directly below it, together with its spacial placement on the Arbitration Agreement form, permits no ambiguity. Moreover, even if the plaintiff's education somehow caused her to view the phrase as ambiguous as used in the Agreement itself, any ambiguity would have been quickly resolved by reference to the accompanying Rules and Procedures, which the plaintiff apparently failed to read.

Plaintiff's allegation that Mr. Santorelli lied to her by misrepresenting the meaning of the query asking whether she wanted to serve as an "Adjudicator" for purposes of deciding disputes under the Arbitration Agreement does not amount to fraudulent inducement, because any reliance by Ms. Floss was not reasonable. The alleged misrepresentation directly conflicted with the language of the Arbitration Agreement, which the court finds to be clear and unambiguous. See e.g. Cohen, 841 F.2d at 285. Whether under federal or Kentucky law, "negligence in failing to read the contract prevents any reliance on oral representations at the time of the signing." Cline v. Allis-Chalmers Corp., 690 S.W.2d 764, 765 (Ky. Ct. App. 1985); Cecil v. Cecil, 712 S.W.2d 353, 355 (Ky. Ct. App. 1986). Although the plaintiff argues that the

employer is an "authority figure" on which she legitimately relied, the plaintiff is far from illiterate, and the parties enjoyed no fiduciary or other special relationship which would entitle the plaintiff to rely on a representation of Ryan's which contradicted the plain language of the contract.

IV. CONCLUSION

Accordingly, for the reasons stated herein, IT IS RECOMMENDED THAT the plaintiff's claim of fraudulent inducement be rejected by the court as a matter of law, and that the Arbitration Agreement be enforced.

OBJECTIONS to this report and recommendation must be filed with the Clerk of Court within ten (10) days of the date of service of the same or further appeal is waived. United States v. Walters, 638 F.2d 947 (6th Cir. 1981), Thomas v. Arn, 474 U.S. 140 (1985). Poorly drafted objections, general objections or objections that require a judge's interpretation should be afforded no effect and are insufficient to preserve the right of appeal. See Howard v. Secretary of Health and Human Services, 932 F.2d 505, 509 (6th Cir. 1991). A party may file a response to another party's objections within ten (10) days after being served with a copy thereof. Rule 72(b), Fed.R.Civ.P.

This the 1st day of September, 1998.

/s/_____
Gregory Wehrman
United States Magistrate Judge

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Filed July 14, 2000]

Nos. 99-5099/5187

99-5099

Sharon Floss,
Plaintiff-Appellant,

v.

Ryan's Family Steak Houses, Inc., et al.,
Defendants-Appellees.

99-5187

Kyle Daniels,
Plaintiff-Appellee,

v.

Ryan's Family Steak Houses, Inc.,
Defendant-Appellant.

ORDER

BEFORE MARTIN, Chief Judge; SUHRHEINRICH, Circuit Judge; and GWIN,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/_____
Leonard Green, Clerk

---

* Hon. James S. Gwin, United States District Judge for the Northern District of Ohio, sitting by designation.